European Copyright Roundtable I – How to implement Article 17?

Instructions

- **In the first round, each speaker will have an opportunity to make a five-minute statement without slides focusing on one of the questions (see list). The speakers were invited to illustrate their statements with examples, so that it is clear what the effects of different interpretations might be.** [30 minutes]
- **In the second round, the panels will engage in a conversation about the questions from the list, moderated by the panel chair.** [30 minutes]
- **In the third round, the audience will have a chance to ask questions addressed to the panelists.** [20 minutes]

Panel 1: General Issues

In the policy debate about the effects of Article 17 (ex-Article 13) of the Directive, there was concern that the provisions may have unintended reach, such as hindering innovation and market entry. While the new measures are aimed at a small number of internet giants, they might catch many other services. The first panel therefore examines the provisions that seek to define scope and target. It will also explore the nature of the newly adopted legal mechanism in the context of existing exclusive rights and the current liability framework. In particular, the panel will explore to what extent Article 17 amends or complements the E-Commerce Directive and the Information Society Directive, including the respective case law produced by the Court of Justice of the European Union.

What is it?

1. Is Article 17 a sui generis right to communication to the public? If not, what conditions of the communication to the public case law apply? What are the consequences of Article 17 DMSD on Article 3 InfoSocD?
2. Is bifurcation of the case-law still possible? (for online content-sharing service providers OCSSPs to follow Article 17 and for other services to return to pre-GS Media/Filmspeler on secondary liability).

Who is the target?

3. Is ‘competing for the same audience’ (Recital 62) part of the test of the definition for an OCSSP?
4. Is it possible for Article 2(6) definition to remain dynamic, tracking CJEU case law?
5. Which services are in a grey area?
6. The German protocol suggests that ‘large amount’ might be interpreted in relation to competition terms, such as ‘dominant’. Is this possible?
7. Does ‘organizing and promoting for profit-making purposes’ cover also passive intermediaries?
8. What is common to the list following ‘such as’? (Article 2(6))?
9. What is the scope of the carve-out for services the main purpose of which is to ‘engage in or facilitate copyright piracy’ (Recital 62)?

Forum shopping?

10. To what extent do we risk that the market players will use the strictest implementation of Article 17 as the least common denominator?
11. How to resolve issues when two countries claim applicability of their national solutions, but the licence only covers a single country or their preventive duties differ?

Panel 2: Licensing obligations

The second panel examines the new licensing obligations. Licences are the mechanism that is supposed to deliver new revenues from platforms to creators (and publishers and producers). They are the key motivation for Article 17. The panel will therefore explore how the national legislator can realistically draft such licensing obligations taking into account practices for musical, artistic, audio-visual and literary works.

How?

1. What form of authorization next to licensing will be possible?
    a. Can the Member States prescribe that a licence cannot require filtering (even short of general monitoring)?
2. Is country-based licensing feasible, and if not, what are the solutions?
3. Can pan-European licensing of content be facilitated?
    a. How? Is it possible to establish a new Article 17 collecting society, acquiring rights from eg YouTubers, bloggers, and dissatisfied current members of CMOs (under Zweckübertragung)?
    b. Which OCSSP might be interested to licence from such a new entity, and why?
    c. What licensing mechanism can be realistically used to implement Article 17(1)? Voluntary or extended collective licensing?
    d. How can such efforts be reconciled with the interests to geo-block content?

What scope?

4. What is the goal and subject scope of "best effort" authorization?
    a. Will all sites be required to license all types of media? If a site is primarily for text, will it need to license video/music/images regardless?
    b. What are the consequences of "best efforts" obligation for markets that license content exclusively?
5. What licensing efforts are mandated?
    a. Is it enough if OCSSPs act only upon request by a right holder, or do they need to proactively search for them?
    b. In the latter case, do they need to contact only a CMO or engage in some diligent search? Alternatively, something in-between?
    c. Should such efforts be continuous or one-off?
    d. Do start-ups envisaged in Article 17(6) have a weaker obligation in this regard?
    e. Can OCSSPs avoid the licensing duty (i.e. decide not to 'carry content' and thus pay for it) when the right holders are willing to license? And how?
6. What is the territorial scope of "best effort" authorization?
    a. How do we determine which countries are in scope of their Article 17 implementation?
    b. How can OCSSPs credibly decide to leave particular markets?

7. Should the Member States implement separate rules on Article 17 licensing contracts?
    a. What should be required beyond Article 17(2)?
    b. Given their impact on non-parties, should these contracts be publically available?

Panel 3: Preventive obligations

The third panel addresses the claim that upload filters will become inevitable in the absence of licensing. It will explore to what extent there is room for an implementation that avoids the indiscriminate filtering of content, and what tools are available to the online platforms today. In addition, the panel will explore potential transparency obligations, which the Member States might impose to facilitate accountability.

What is it?

1. What is the consequence of a violation of preventive duties? A copyright infringement or other type of liability? What are the effects if sanctions are not harmonized?
2. How does the stakeholder dialogue and issued guidelines based on Article 17(10) limits the Member State's ability to experiment in their national laws?

What is required?

3. Can Article 17(4)(b) be implemented without ex-ante technical filtering of all the content?
    a. If yes, what other measures might be sufficient and when?
    b. Does the data protection law limit such filtering in any substantial way?
4. What information is required to trigger Article 17(4)(b) preventive obligations?
    a. Must this information be submitted to each OCSSP separately?
    b. Does this information differ for different type and size of OCSSPs?
    c. Should the Member States specify what information is required, and how it is accessible, e.g. prescribe API, open standards (suggested in German protocol, seeking to prevent de facto private copyright register)? What are the effects of different specifications?
5. Is the prohibition of a general monitoring obligation going beyond Article 15 ECD?
    a. If yes, what are the consequences for Article 17(4)(b)? How do they resolve?

What transparency?

6. How should Member States assure transparency of the used preventive tools?
    a. Should the transparency obligations be periodical (e.g. publishing reports/audits) or only on the request (Article 17(10))?

Panel 4: Over-blocking

The final panel analyses if the creator's and user's autonomy and fundamental rights can be sufficiently reflected in implementations of Article 17. It explores how to resolve the problem of inevitable false positives in automated enforcement, to incentivize quality in preventive efforts and to design the mechanism of the follow-up dispute resolution in order to assure compliance with freedom of expression safeguards.

Scope of permissible use

1. What are the possibilities of implementation of Article 17(2) extension of licences for end-users?
    a. What to do with the right of reproduction not mentioned in the Article?
2. How to resolve the obvious conflict between exceptions as regulated by Article 5(1) of the InfoSoc Directive and by Article 17(7)?
3. How to resolve conflicts between national rules which allow different *additional* catalogues of exceptions and limitations?

Effective redress mechanism

4. What are the possibilities of implementation of the internal redress mechanism in Article 17(9)?
    a. Should these be limited to OCSSPs or extend beyond?
5. What models for ADR-disputes do there exist?
    b. Should users be allowed to bear a fee for engaging such a procedure?
    c. Are Article 17(7) exceptions contract-proof? Are OCSSPs now always obliged to carry content subject to these exceptions?
    d. Should OCSSPs be obliged to pay fees for over-removal mistakes to incentivize them to avoid false positives?
    e. Given the strict liability of OCSSPs, should now also right holders bear the cost of mistakes to fulfil the obligation under Article 17(7)? And if so, when and how?
    f. What transparency should govern these procedures?
6. What is the meaning of an obligation to allow users to 'assert the use of an exception or limitation'? What are the models of effective implementation?
    a. Should the European Commission further facilitate these ADR procedures on the European-level, following examples in consumer law or domain name law?

Transparency

7. Should the transparency obligation of Article 17(8) extend also to users' rights to request information? Is Article 17(10) (regarding users' organisations' access to adequate information) a prescription to this end?
    a. Should the transparency obligations be periodical (e.g. publishing reports/audits) or only on request?
    b. If OCSSPs and ADR reports/audits indicate systemic violation of freedom of expression, what mechanisms should the Member States adopt to tackle the problem?